



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUN 23 2014

The Honorable Anthony Copeland
City of East Chicago
4527 Indianapolis Boulevard
East Chicago, Indiana 46312

REPLY TO THE ATTENTION OF:

Re: Proposed Demolitions within the U.S. Smelter and Lead Refining, Inc. Superfund Site

Dear Mayor Copeland:

I am writing in response to your letter dated June 16, 2014, concerning proposed demolitions within the boundaries of the U.S. Smelter and Lead Refining, Inc. Superfund Site (Site). My response is based upon the facts presently known to the United States Environmental Protection Agency (EPA) and is provided solely for informational purposes.

I. STATUS OF THE IDENTIFIED PROPERTY AND EPA'S ACTIVITIES

As you and your staff are aware, what you refer to in your letter as the Calumet neighborhood is located within an area EPA refers to as Zone 2 of Operable Unit 1 of the Site. The Site was placed on the National Priorities List (NPL) in 2008. Following placement of the Site on the NPL, EPA conducted a Remedial Investigation (RI) and Feasibility Study (FS). The purpose of the RI was to identify contaminants of concern and the extent of the contamination. The RI concluded that lead and arsenic in concentrations that pose a risk to human health and the environment are located in some but not all of the properties located within Operable Unit 1 of the Site. Operable Unit 1 is bounded on the west by the Indiana Harbor Canal; on the north by Chicago Avenue; and the east by Parrish Avenue; and, on the south by 149th Place and 151st Street. The purpose of the FS was to identify cost-effective ways in which to address the contamination. In 2012, EPA published a proposed plan for addressing the lead and arsenic contamination. On November 30, 2012, EPA issued a Record of Decision in which it announced its choice of remedy. The chosen remedy calls for the excavation and off-site disposal of soils that contain lead and arsenic above the identified actions levels to a maximum depth of twenty-four inches below ground surface.

Since September 2013, EPA has been negotiating a possible consent agreement with two Potentially-Responsible Parties (PRPs) regarding clean-up of the Site. These negotiations are proceeding at this time. EPA will consider alternatives to a consent agreement if it determines that further negotiations will not prove fruitful.

II. STATUS OF CONTACTS WITH THE CITY OF EAST CHICAGO

Throughout the process described above, EPA has met with representatives of the City of East Chicago. The purpose of the meetings has been to make certain the City understands what work

EPA is performing and is planning to perform, and the timeframe for completing the work. The meetings have also allowed the City to share with EPA its concerns about the work and its broader goals for the Calumet neighborhood.

On June 9, 2014, Winna Guzman, the Building Commissioner for the City, sent an email to Michael Berkoff, EPA Remedial Project Manager. Ms. Guzman asked Mr. Berkoff to review information pertaining to specifications that the City intended to use to solicit bids for demolition work, some of which may be performed within the Site. Mr. Berkoff advised me of Ms. Guzman's request. I communicated my concerns to Mr. Berkoff that if the City demolished buildings within the Site, these actions might give rise to potential liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). Shortly thereafter, Mr. Berkoff shared these concerns with Ms. Guzman. I also voiced my concerns to City Attorney Carla Morgan on June 12, 2014.¹

As your staff no doubt advised you, Mr. Berkoff and I did not tell the City not to demolish buildings. Instead, we merely sought to alert the City to the existence of liability risks associated with demolishing buildings and to suggest that if the City elected to proceed with demolition, it would be well advised to do so cautiously, with a full appreciation of the risks, and with a well-considered plan for managing the risks.

Your letter of June 16, 2014, seeks EPA's guidance on "how to balance these risks, and whether the risk of imminent injury is outweighed by the potential risk of [PRPs] coming after the City as an operator of the site." It also asks EPA to "assist the City with drafting a plan which balances these risks."

III. EPA'S ROLE AND LIMITATIONS

EPA has only those authorities expressly granted to it by statute or regulation. These authorities allow EPA to do important work like the identification and removal of lead and arsenic contaminated soils from within the Site. EPA is not authorized, however, to provide advice to the City on how to balance the risks of proceeding with demolition and potentially becoming a liable party at the Site against the risks of postponing demolition. The City alone must weigh and balance the risks. In grappling with this decision, however, the City might find it useful to retain experienced environmental counsel who can help the City understand and manage the liability risks and develop a sound risk management strategy. I cannot fill that role for the City.

If the City elects to proceed with demolition and provides EPA with its plan for minimizing the risks associated with demolition, EPA will work with the City to implement quickly the City's

¹ As Ms. Morgan is aware, potential liability includes an action in contribution by PRPs at the Site as well as potential liability to the United States. See, e.g., *Policy Towards Owners of Residential Property at Superfund Sites* (July 3, 1991) (EPA generally will not require owners of residential property (like the City) to perform a response action or pay response costs if the owner's activities are consistent with the Policy but the Policy generally does not apply "to an owner of residential property who has undertaken activities leading to a release or threat of release of hazardous substances, resulting in the taking of a response action at the site").

preferred plan. Several options for reducing risk of liability to the City come to mind and others may occur to the City. Some municipalities have managed the risk of liability by simply exercising extreme care during demolition. Extreme care here may include a decision to only remove those portions of the structure that are above ground until EPA has completed Site work or advised the City that the property does not contain lead or arsenic concentrations in soil above the action levels. Alternatively, the City might also consider sampling properties in advance of demolition to determine whether the soils at these properties pose a risk to human health or the environment. Other municipalities have proceeded with demolition after receiving what is sometimes referred to as an "EPA comfort letter." To be clear, a "comfort letter" is not a "no action assurance" letter, a distinction that may be lost on all but the most experienced practitioners of environmental law. Finally, EPA is willing to negotiate an agreement with the City that might be characterized as a "Prospective Operator Agreement or POA." A POA is akin to a "Prospective Purchaser Agreement," but applies to prospective operators rather than purchasers. Negotiation of a POA may delay demolition but might afford the City the greatest level of protection. The options that I have set forth above are not meant as an exhaustive or exclusive list of options. EPA is open to considering other options that might be suggested by the City.

IV. CONCLUSION

EPA looks forward to continuing discussions with the City about the important issues raised in your letter of June 16, 2014, subject to our inability to provide the City with what is essentially legal advice.

If you or your staff have any questions or would like to schedule a meeting, please do not hesitate to contact me. I may be reached at (312) 353-3804 or kaiser.steven@epa.gov.

Sincerely,



Steven P. Kaiser
Associate Regional Counsel

cc: Michael Berkoff (EPA)
Carla Morgan (City of East Chicago)